

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 * * *

4 ANTHONY MITCHELL, *et al.*,

5 Plaintiffs,

6 v.

7 CITY OF HENDERSON, NEVADA, *et al.*,

8 Defendants.

Case No. 2:13-cv-01154-APG-CWH

**ORDER GRANTING IN PART AND
DENYING IN PART THE NORTH LAS
VEGAS DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

(ECF No. 111)

9
10 This is a civil rights lawsuit brought by plaintiffs Anthony Mitchell, Linda Mitchell, and
11 Michael Mitchell. The case arises out of a June 2011 incident involving City of Henderson police
12 and the City of North Las Vegas Police Department SWAT team. The Henderson police were
13 called to a domestic violence incident and responded to non-party Phillip White's house. White
14 was inside the home with his infant child. North Las Vegas Police Department SWAT team
15 members were called to the scene to assist. Officers noticed that residents in nearby houses,
16 specifically the plaintiffs' homes, were photographing the police and were believed to be
17 communicating with White about the police activity. The officers eventually forced their way
18 into Anthony Mitchell's home, shot him with pepperball rounds, and arrested him. They also
19 allegedly unlawfully entered Michael and Linda Mitchell's home, removed Linda from the home,
20 searched their car without a warrant, and arrested Michael without probable cause, among other
21 alleged violations.

22 The plaintiffs settled their claims with the City of Henderson defendants. ECF No. 108.
23 Thus, the only remaining claims are against the City of North Las Vegas and its employees,
24 Michael Waller, Drew Albers, David Cawthorn, Eric Rockwell, and Travis Snyder (collectively,
25 the NLVPD defendants). The NLVPD defendants move for summary judgment on Anthony's
26 claims against them. I grant the motion as to Anthony's claims for municipal liability and
27 negligent hiring, training, and supervision, and I deny the rest of the motion. I also direct the
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1 parties to meet and confer about what, if any, claims that are not addressed in the summary
2 judgment briefing remain pending.

3 **I. BACKGROUND**

4 At approximately 7:30 a.m. on July 10, 2011, Phillip White had an argument with his wife
5 Sussette. ECF No. 119-1 at 7. According to White, his wife pushed him, ran out of the house, and
6 called the police. *Id.* at 7-8, 14. Sussette told the police that White hit her,¹ but she also told the
7 police she did not believe White would harm their daughter. ECF Nos. 119-3 at 22; 119-2 at 5.

8 City of Henderson police officers arrived at the Whites' home at 363 Eveningside Avenue
9 in Henderson. ECF Nos. 111-4 at 12; 119-1 at 5, 7. White answered the door and invited the
10 officers inside but told them he would not come outside and leave his one-month-old daughter
11 alone. ECF No. 119-1 at 7-8. White had a 3-inch pocketknife clipped to his pocket. *Id.* at 13.
12 According to White, the officers did not tell him why they were there, but he assumed his wife
13 had called them. *Id.* at 11. The police officers did not enter the house and walked away. *Id.*

14 White left the front door open, with the screen door closed, for approximately 45 minutes,
15 but the officers did not accept his invitation to enter the house. *Id.* at 7-8. He sat on the couch
16 with his daughter nearby until he closed the door when he needed to use the bathroom. *Id.* at 9.
17 He then laid down and fell asleep without reopening the front door. *Id.* at 9, 11.

18 The plaintiffs in this case are White's neighbors. Plaintiff Anthony Mitchell lived at 367
19 Eveningside. ECF No. 111-4 at 12. His parents, Michael and Linda Mitchell, lived at 362
20 Eveningside. *Id.*

21 Anthony woke up that morning to sirens in his neighborhood. *Id.* He checked his phone
22 and saw that he had missed a call from his father, so he called him back. *Id.* Michael told
23 Anthony that he had spoken with White. *Id.* Michael advised Anthony that White had invited the
24 police inside but that the police wanted White to leave the baby inside the house and come out,
25 but White was not going to do that. *Id.* at 13.

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28 ¹ White denies striking his wife. ECF No. 119-1 at 14.

1 Anthony then went to his front door, opened it, and yelled at the officers to turn off their
2 siren. *Id.* The officers shut off the siren. *Id.* Anthony then took a shower and exercised inside his
3 house. *Id.* at 13-14. Some time later, he looked out his kitchen and garage windows to see if the
4 police were still there. *Id.* at 14. They were, and Anthony began taking pictures of the officers on
5 his cell phone. *Id.* Anthony saw Henderson police officers aim a rifle at his parents' house. *Id.* at
6 15. He spoke to his father on the phone, and Michael stated that an officer had pointed a rifle at
7 him twice while Michael was taking photos of them. *Id.*

8 At approximately 10:10 a.m., NLVPD SWAT was called to assist the Henderson police.
9 ECF No. 111-2 at 2. Defendants Michael Waller, David Cawthorn, Drew Albers, Eric Rockwell,
10 and Travis Snyder were NLVPD officers that responded to the scene. ECF Nos. 111-2 at 2; 111-3
11 at 2; 119-5 at 7.

12 When NLVPD SWAT arrived, Lieutenant Cassell of the Henderson Police Department
13 informed non-party NLVPD SWAT lieutenant Anthony DiMauro that they were responding to a
14 domestic violence incident that "went south." ECF No. 111-3 at 2. Cassell also told DiMauro that
15 White had weapons, was with his four-week-old baby inside his home, was refusing to come out,
16 and had said that the police would have to come into the house and get him. ECF Nos. 111-2 at 2;
17 111-3 at 2. Additionally, Cassell told DiMauro that the occupants of 362 Eveningside (Michael
18 and Linda Mitchell) were communicating with White and possibly providing him with tactical
19 information about the police officers' locations and movements.² ECF Nos. 111-2 at 2; 111-3 at
20 2. The command post advised NLVPD SWAT that the occupants of 362 and 367 Eveningside
21 were related. ECF No. 111-2 at 3.

22 Albers noticed someone inside the garage of 367 Eveningside (Anthony Mitchell) who
23 was taking pictures or video of the police. *Id.* at 2. According to Cawthorn, the window was
24 covered with a sunshade with a large square cut out of the middle. *Id.* Cawthorn characterized
25 this window as a "sniper blind" because it allows the person behind the window to observe

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27 ² Anthony spoke with White once or twice that morning while the police were outside their homes.
28 ECF No. 111-4 at 18. Anthony told White that Anthony had contacted the media and that SWAT was
there. *Id.* Anthony denies that he told White how many officers were outside. *Id.* at 16.

1 activities outside the window while limiting observation of the person behind it. *Id.* at 2-3.
2 Anthony describes the window as the border being covered by four pieces of reflective material
3 on the top, bottom, and two sides, leaving a two by two foot opening in the middle. ECF No. 111-
4 4 at 50.

5 According to Cawthorn, Albers ordered Anthony to move away from the window, but
6 Anthony refused and extended his middle finger at Albers. ECF Nos. 111-2 at 3; 111-4 at 23.
7 Anthony admits he made the middle finger gesture at the officers, but he denies that he heard any
8 commands because the officers were located 40 to 60 feet away from his house. ECF No. 111-4 at
9 23, 26. Anthony continued to photograph and film the officers. ECF No. 111-2 at 2. According
10 to Anthony, NLVPD SWAT officers were pointing rifles at him as he was taking pictures. ECF
11 No. 111-4 at 16.

12 At some point, the police called Anthony and asked him if they could use his home for a
13 better tactical advantage against White. *Id.* at 21. Anthony refused the request. *Id.* He then
14 decided to put on a Kevlar vest and returned to his garage window to continue taking pictures. *Id.*
15 at 16, 27. He also contacted the media about the situation. *Id.* at 18.

16 According to Cawthorn, Anthony's actions were a safety issue for the officers and divided
17 their attention between White's residence and Anthony's. ECF No. 111-2 at 3. The officers
18 therefore decided to attempt to contact Anthony. *Id.* The officers "plan[ned] to ask [Anthony] to
19 leave and arrest him if he refused." *Id.*

20 Around noon, Albers, Snyder, Rockwell, and Cawthorn walked towards Anthony's front
21 door. ECF Nos. 111-2 at 3; 119-2 at 11. According to Cawthorn, Albers saw Anthony through
22 the garage window and ordered him to go to the front door. ECF No. 111-2 at 3. Anthony denies
23 that any officer told him to go to the front door. ECF No. 111-4 at 56. The officers knocked on
24 the front door but there was no response. ECF No. 111-2 at 3-4. Snyder twice stated "open the
25 door," but there was no response. *Id.* at 4.

26 At that point, Rockwell forced the front door open using a metal ram. ECF No. 111-2 at 4.
27 Anthony was in the living room area and talking on a cell phone with his mother. ECF Nos. 111-2
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1 at 4; 111-4 at 17. The parties differ regarding what happened after the officers forced the door
2 open.

3 According to Cawthorn, Snyder ordered Anthony to get on the ground, but Anthony did
4 not do so and instead kept talking on his cell phone. ECF No. 111-2 at 4. Snyder ordered
5 Anthony to get off the phone and get on the ground. *Id.* Anthony then got on the ground but
6 continued to talk on the phone and turned away from the officers so they could not see his hands.
7 *Id.* Snyder ordered Anthony to crawl to the front door and drop the phone. *Id.* Anthony was still
8 turned away from the officers and did not drop his phone. *Id.* Cawthorn fired three pepperball
9 rounds at Anthony, hitting him in the shoulder, buttocks, and lower back. *Id.* Anthony then
10 dropped his phone, laid on the floor, and put his hands away from his body. *Id.* Cawthorn placed
11 Anthony into custody and told Anthony that he was under arrest for obstructing a police officer.
12 *Id.*

13 Anthony, however, testified that after the door was forced open, multiple officers
14 simultaneously gave him orders to get on the ground, get off the phone, and to crawl towards
15 them. ECF No. 111-4 at 17. According to Anthony, within a second or two of the officers
16 ramming his door open and giving him these commands, he was shot with a pepperball under his
17 armpit, which made him drop the phone and collapse to the floor. *Id.* at 17-18. He heard the
18 officers yelling at him to shut off his phone and crawl to them when he was shot again with
19 pepperball rounds. *Id.* at 17. Anthony disputes he continued to talk on the phone because he
20 states he did not have the phone in his hand anymore once he was on the ground. *Id.* at 58.
21 According to Anthony, there was no time to respond to the officers' commands before he was
22 shot with the pepperballs. *Id.* at 18. Anthony put his hands over his head and curled up with his
23 back facing the door so that they would not shoot him in the face if they shot him again. *Id.* at 18.

24 The officers did not shoot at him again, so he got onto his stomach and put his hands
25 behind his back. *Id.* Two or more officers then forcefully dropped their knees onto his back and
26 handcuffed him. *Id.* at 27-28. One officer took him outside and pressed his face into the stucco
27 wall while other officers searched his home. *Id.* at 28. An officer stated to him "You want to flip
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1 us off, huh?” *Id.* Another officer looked at that officer and said “Shhhh.” *Id.* Anthony denies he
2 was told why he was under arrest. *Id.* at 61.

3 Cawthorn turned Anthony over to the Henderson Police Department, and Anthony was
4 booked into the Henderson Detention Center. ECF No. 111-2 at 4. The charges against Anthony
5 were later dismissed with prejudice. ECF No. 111-4 at 36.³

6 The plaintiffs filed a twenty-two count first amended complaint (FAC) that included
7 claims against both the Henderson defendants and the NLVPD Defendants. ECF No. 3. The
8 federal claims in the FAC were:

- 9 (1) Retaliation in violation of the Free Speech Clause of the First Amendment, against all
10 defendants;
- 11 (2) Unlawful arrest of Anthony Mitchell and unlawful search of Anthony’s home and
12 vehicle, in violation of the Fourth Amendment, against Doe Officers 1–10, 21–22, 24–30,
13 Sergeant Waller, and Officers Albers, Cawthorn, Rockwell, and Snyder;
- 14 (3) Excessive force against Anthony Mitchell, in violation of the Fourth Amendment,
15 against Doe Officers 1–10, Sergeant Waller, and Officers Albers, Cawthorn, Rockwell,
16 and Snyder;
- 17 (4) Unlawful arrest of Michael Mitchell, in violation of the Fourth Amendment, against
18 Doe Officers 31–35;
- 19 (5) Unlawful arrest of Linda Mitchell, in violation of the Fourth Amendment, against Doe
20 Officers 21–30;
- 21 (6) Unlawful search of Michael Mitchell’s and Linda Mitchell’s home and of Michael’s
22 vehicle, in violation of the Fourth Amendment, against Doe Officers 21–30;
- 23 (7) Unlawful peacetime quartering of soldiers in Michael Mitchell’s and Linda Mitchell’s
24 home, in violation of the Third Amendment, against Doe Officers 21–30;
- 25 (8)(a) Unlawful punishment of Anthony, in violation of the Eighth Amendment, against
26 Does Officers 1–10, 32, and 55;
- 27 (8)(b) Unlawful punishment of Michael, in violation of the Eighth Amendment, against
28 Doe Officers 21, 31–35;
- (8)(c) Deliberate indifference to Anthony’s medical needs, in violation of the Eighth
Amendment, against Doe Officers 36 and 37;
- (9) Malicious prosecution, in violation of the First, Fourth, and Fourteenth Amendments,
against three Henderson defendants and Cawthorn;

3 Because the motion at issue involves only Anthony’s claims against the NLVPD defendants, a
detailed discussion about what occurred with White, Michael Mitchell, and Linda Mitchell is unnecessary.
It suffices to state that Michael and Linda Mitchell generally allege that during this same incident they
were removed from their home; that officers unlawfully entered, searched, and remained in their home and
searched their car and Linda’s purse without a warrant, consent, or exigent circumstances; and that
Michael was placed under arrest without probable cause. The charges against Michael were later
dismissed. The police eventually made forcible entry into White’s home, retrieved the baby, and placed
White under arrest. The charges against White were later dismissed.

1 (10) Municipal liability under *Monell*, against the City of Henderson and the City of North
2 Las Vegas;
3 (11) Conspiracy under 42 U.S.C. § 1985(3), against unspecified defendants; and
4 (12) Neglect to prevent conspiracy under 42 U.S.C. § 1986, against unspecified
5 defendants.

6 The remaining ten claims were based on Nevada state law:

7 (13) Assault, against unspecified defendants;
8 (14) Battery, against unspecified defendants;
9 (15) False arrest and imprisonment, against unspecified defendants;
10 (16) Intentional infliction of emotional distress, against unspecified defendants;
11 (17) Negligent infliction of emotional distress, by inference against Doe Officers 1–10,
12 Sergeant Waller, and Officers Albers, Cawthorn, Rockwell, and Snyder;
13 (18) Civil conspiracy, against unspecified defendants;
14 (19) Abuse of process, against unspecified defendants;
15 (20) Malicious prosecution, against unspecified defendants;
16 (21) Respondeat superior, against the City of Henderson and City of North Las Vegas; and
17 (22) Negligent hiring, retention, supervision, and training, against the City of Henderson
18 and City of North Las Vegas.

19 The City of Henderson defendants have settled. I previously dismissed the plaintiffs’
20 claims against defendant NLVPD Chief Joseph Chronister. ECF No. 48 at 18-19. I also
21 dismissed the claims in the FAC for malicious prosecution in counts nine and twenty, the Third
22 Amendment in count seven, § 1985 conspiracy in counts eleven and twelve, negligent infliction
23 of emotional distress in count seventeen, abuse of process in count nineteen, and respondeat
24 superior in count twenty-one. *Id.* at 26, 31, 33, 36-37.

25 The NLVPD defendants move for summary judgment, identifying the following as the
26 claims remaining against them:

27 **count two:** unlawful arrest of Anthony Mitchell and unlawful search of Anthony’s home
28 and vehicle, in violation of the Fourth Amendment;
count three: excessive force against Anthony Mitchell;
count ten: municipal liability;
count thirteen: assault;
count fourteen: battery;
count fifteen: false arrest and imprisonment;
count sixteen: intentional infliction of emotional distress;
count eighteen: civil conspiracy;
count twenty-two: negligent hiring, retention, supervision, and training.

ECF No. 111 at 5. In response, the plaintiffs do not dispute that these are Anthony’s remaining
claims against the NLVPD defendants. Neither party explains why counts one and eight are no
longer pending for Anthony (although likely at least some, if not all, of the allegations in count

1 eight no longer apply because they were directed at Anthony's post-arrest detention by the
2 Henderson police). Additionally, the plaintiffs assert in their opposition that because the NLVPD
3 defendants did not move for summary judgment against Michael and Linda Mitchell, their claims
4 remain pending. ECF No. 119 at 2. The NLVPD defendants do not respond to this assertion in
5 their reply.

6 After the NLVPD defendants moved for summary judgment, the plaintiffs were granted
7 leave to file a second amended complaint. Although directed to file it, the plaintiffs never did.
8 See ECF No. 131. Because the parties have briefed the claims in the FAC, I will likewise refer to
9 the claims in the FAC in resolving this motion.

10 But because there is some confusion about what claims remain pending, I direct the
11 parties to meet and confer, and to file a joint status report on the following: (1) whether the First
12 Amendment retaliation claim in count one remains pending on behalf of Anthony against the
13 NLVPD defendants; (2) whether the Eighth Amendment deliberate indifference claim in count
14 eight remains pending on behalf of Anthony against the NLVPD defendants; and (3) whether any
15 claim remains pending on behalf of Michael or Linda Mitchell against the NLVPD defendants.

16 **II. LEGAL STANDARD**

17 Summary judgment is appropriate if the pleadings, discovery responses, and affidavits
18 demonstrate "there is no genuine dispute as to any material fact and the movant is entitled to
19 judgment as a matter of law." Fed. R. Civ. P. 56(a), (c). A fact is material if it "might affect the
20 outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
21 (1986). An issue is genuine if "the evidence is such that a reasonable jury could return a verdict
22 for the nonmoving party." *Id.*

23 The party seeking summary judgment bears the initial burden of informing the court of the
24 basis for its motion and identifying those portions of the record that demonstrate the absence of a
25 genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then
26 shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of
27 material fact for trial. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 531 (9th Cir. 2000). I
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1 view the evidence and reasonable inferences in the light most favorable to the non-moving party.
2 *James River Ins. Co. v. Hebert Schenk, P.C.*, 523 F.3d 915, 920 (9th Cir. 2008).

3 **III. SECTION 1983 CLAIMS**

4 To establish liability under 42 U.S.C. § 1983, a plaintiff must show the violation of a right
5 secured by the Constitution and laws of the United States, and must show that the deprivation was
6 committed by a person acting under color of state law. *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th
7 Cir. 2003). The NLVPD defendants do not contest that they acted under color of law. Thus, the
8 dispute centers on whether they violated Anthony's constitutional rights.

9 The parties also dispute whether the individual NLVPD defendants are entitled to
10 qualified immunity. To allay the "risk that fear of personal monetary liability and harassing
11 litigation will unduly inhibit officials in the discharge of their duties," government officials
12 performing discretionary functions may be entitled to qualified immunity for claims made under
13 § 1983. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). Qualified immunity protects "all but
14 the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335,
15 341 (1986). In ruling on a qualified immunity defense, I consider whether the evidence viewed in
16 the light most favorable to the nonmoving party shows the defendant's conduct violated a
17 constitutional right. *Sorrels v. McKee*, 290 F.3d 965, 969 (9th Cir. 2002). If the plaintiff has
18 shown the defendant violated a constitutional right, I then must determine whether that right was
19 clearly established. *Id.*

20 A right is clearly established if "it would be clear to a reasonable officer that his conduct
21 was unlawful in the situation he confronted." *Wilkins v. City of Oakland*, 350 F.3d 949, 954 (9th
22 Cir. 2003) (emphasis omitted) (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)). I make this
23 second inquiry "in light of the specific context of the case, not as a broad general proposition."
24 *Saucier*, 533 U.S. at 201. An officer will be entitled to qualified immunity even if he was
25 mistaken in his belief that his conduct was lawful, so long as that belief was reasonable. *Wilkins*,
26 350 F.3d at 955.

27 **A. Fourth Amendment Violations Related to Anthony's House, Vehicle, and Arrest**

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1 Count two asserts the defendants violated Anthony's Fourth Amendment rights by
2 unlawfully entering into his house and searching his house and car without consent, a warrant, or
3 probable cause, and no exigent circumstances existed to dispense with the need to obtain a
4 warrant. It also alleges the defendants seized and arrested Anthony in his home without a
5 warrant, probable cause, or exigent circumstances.

6 The Fourth Amendment protects against "unreasonable searches and seizures." U.S.
7 Const. amend. IV. "[S]earches and seizures inside a home without a warrant are presumptively
8 unreasonable." *Hopkins v. Bonvicino*, 573 F.3d 752, 763 (9th Cir. 2009) (quotation omitted).
9 However, there are two exceptions to the warrant requirement for searches of the home: (1)
10 emergency and (2) exigency. *Id.*

11 "The emergency exception stems from the police officers' community caretaking function
12 and allows them to respond to emergency situations that threaten life or limb." *Id.* (quotation and
13 internal quotation marks omitted). Under the emergency exception, a "police officer may not
14 enter a home to investigate a medical emergency or other immediate risk to life or limb unless he
15 has reasonable grounds to believe an emergency is at hand and that his immediate attention is
16 required." *Id.*

17 Under the exigency exception, police officers may "enter a home without a warrant if they
18 have both probable cause to believe that a crime has been or is being committed and a reasonable
19 belief that their entry is necessary to prevent . . . the destruction of relevant evidence, the escape
20 of the suspect, or some other consequence improperly frustrating legitimate law enforcement
21 efforts." *Id.* (quotation omitted). Under this exception, the government bears the burden of
22 showing that (1) "the officer had probable cause to search the house" and (2) "exigent
23 circumstances justified the warrantless intrusion." *Id.* at 766-67 (quotation omitted).

24 Viewing the facts in the light most favorable to Anthony, a reasonable jury could find the
25 officers violated his Fourth Amendment rights. They entered his home, and searched and seized
26 him without a warrant. The entry and seizure therefore are presumptively unreasonable.
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1 A reasonable jury could find facts that would not support either an emergency or exigency
2 exception to overcome that presumption. First, a genuine dispute remains about whether the
3 officers had reasonable grounds to believe an emergency was at hand that required immediate
4 entry into Anthony's home. The NLVPD defendants characterize the situation as a dangerous
5 "barricade/hostage" situation, but White invited the officers into his home and then left his door
6 open and remained visible for forty-five minutes. His wife told police he was not a threat to the
7 child's safety. Anthony was taking pictures of the officers, but there is no evidence he threatened
8 them or displayed weapons towards them. And while the officers may have suspected he was
9 conveying information to White, a reasonable jury could conclude the officers had no information
10 to support that suspicion.

11 A genuine dispute remains about whether there was an emergency at the moment the
12 officers chose to enter Anthony's house, rather than during the prior four hours the incident had
13 been unfolding. When the officers first arrived at the scene, Sussette was out of White's home
14 and thus was not in danger. She told the officers White would not harm the child. Even if the
15 officers believed Anthony was distracting them or was conveying information to White, a
16 reasonable jury could conclude that nothing happened in the intervening four hours that would
17 have provoked an emergency response at the time the officers decided to move on Anthony's
18 home. Indeed, a reasonable jury could find there was ample time for the officers to obtain a
19 warrant before breaking down Anthony's door and placing him into custody. For similar reasons,
20 a reasonable jury could find there were no exigent circumstances that justified the warrantless
21 intrusion. Further, a genuine dispute remains about whether the police officers had probable
22 cause to believe that Anthony had committed a crime because Anthony denies that he disobeyed
23 officer commands. Nev. Rev. Stat. § 197.190 (obstructing a police officer); *see also id.* § 197.090
24 (interfering with a public officer "by means of any threat, force or violence" or "knowing[]
25 resist[ance] by force or violence").

26 The NLVPD defendants are not entitled to qualified immunity. As discussed in my prior
27 order on the motion to dismiss (ECF No. 48) and as set forth above, the law on warrantless entries
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1 into the home, and the exceptions thereto, was clearly established before this incident. I therefore
2 deny the NLVPD defendants' motion for summary judgment on this claim.

3 **B. Excessive Force**

4 Count three alleges the NLVPD defendants used excessive force before entering
5 Anthony's house when they pointed loaded firearms at him. It also alleges the officers used
6 excessive force after entering his home when they fired pepperball rounds at him, dropped a knee
7 into his back while cuffing him, and pressed his face against the stucco wall.

8 Excessive force in the course of an arrest is analyzed under the Fourth Amendment. *Smith*
9 *v. City of Hemet*, 394 F.3d 689, 700 (9th Cir. 2005) (citing *Graham v. Connor*, 490 U.S. 386
10 (1989)). In determining the reasonableness of a non-deadly-force seizure, I balance "the nature
11 and quality of the intrusion on the individual's Fourth Amendment interests against the
12 countervailing government interests at stake." *Miller v. Clark Cnty.*, 340 F.3d 959, 964 (9th Cir.
13 2003) (quotations omitted). This entails a three-step analysis. *Id.* First, I assess "the gravity of
14 the particular intrusion on Fourth Amendment interests by evaluating the type and amount of
15 force inflicted." *Id.* Second, I assess "the importance of the government interests at stake by
16 evaluating: (1) the severity of the crime at issue, (2) whether the suspect posed an immediate
17 threat to the safety of the officers or others, and (3) whether the suspect was actively resisting
18 arrest or attempting to evade arrest by flight." *Id.* Third, I weigh the gravity of the intrusion
19 against the government's interest to determine whether the amount of force was constitutionally
20 reasonable. *Id.*

21 The reasonableness inquiry looks at all the relevant objective facts and circumstances that
22 confronted the arresting officers in each particular case, "judged from the perspective of a
23 reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Drummond ex rel.*
24 *Drummond v. City of Anaheim*, 343 F.3d 1052, 1058 (9th Cir. 2003) (quotation omitted); *Smith*,
25 394 F.3d at 701. Additionally, the reasonableness analysis must consider the fact that "police
26 officers are often forced to make split-second judgments—in circumstances that are tense,
27 uncertain, and rapidly evolving—about the amount of force that is necessary in a particular
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1 situation.” *Drummond*, 343 F.3d at 1058 (quotation omitted). Because the reasonableness
2 balancing test “nearly always requires a jury to sift through disputed factual contentions, and to
3 draw inferences therefrom,” courts should grant summary judgment in excessive force cases
4 “sparingly.” *Id.* at 1056. “This is because police misconduct cases almost always turn on a jury’s
5 credibility determinations.” *Id.* However, I may decide reasonableness as a matter of law if, “in
6 resolving all factual disputes in favor of the plaintiff, the officer’s force was objectively
7 reasonable under the circumstances.” *Jackson v. City of Bremerton*, 268 F.3d 646, 651 n.1 (9th
8 Cir. 2001) (internal quotation omitted).

9 Genuine disputes remain about whether the NLVPD defendants used excessive force.
10 Viewing the facts in the light most favorable to Anthony, Albers pointed a loaded weapon at
11 Anthony when Anthony was taking pictures of the police activity. Anthony was not suspected of
12 any crime at that time and he did not threaten the officers or display weapons at them. He was
13 not actively resisting arrest or attempting to flee.

14 The officers later forced their way into Anthony’s home and shot Anthony with
15 pepperballs, forcefully dropped knees onto his back, and shoved his face into a stucco wall.
16 Viewing the facts in the light most favorable to Anthony, he posed little to no risk to the officers
17 when they entered through the front door. He was unarmed and the officers did not give him time
18 to respond to multiple simultaneous commands before he was shot with pepperballs. He testified
19 he was lying on his stomach with his arms behind his back when one or more officers dropped
20 their knees onto his back. Additionally, he was restrained and not resisting when his face was
21 pushed into a stucco wall and held there. The crimes that the NLVPD defendants rely on to
22 justify their behavior are misdemeanors. Nev. Rev. Stat. § 197.190 (obstructing a police officer, a
23 misdemeanor); *id.* § 197.090 (interfering with a public officer, a gross misdemeanor). A
24 reasonable jury could find the level of force outweighed the governmental interests at stake.
25 Further, the officers are not entitled to qualified immunity. *See, e.g., Espinosa v. City & Cnty. of*
26 *S.F.*, 598 F.3d 528, 537 (9th Cir. 2010); *Tekle v. United States*, 511 F.3d 839, 845 (9th Cir. 2007);
27 *Frunz v. City of Tacoma*, 468 F.3d 1141, 1143 (9th Cir. 2006); *Robinson v. Solano Cnty.*, 278
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1 F.3d 1007, 1014 (9th Cir. 2002) (en banc). I therefore deny the NLVPD defendants' motion on
2 this claim.

3 **C. Monell Liability**

4 Count ten alleges the constitutional violations were the result of unwritten NLVPD policies
5 of summarily violating individuals' constitutional rights as punishment for either not obeying
6 police orders or for exercising their First Amendment rights in filming police conduct or
7 expressing their opinion about police conduct; searching homes and ordering citizens to leave
8 their homes without legal justification; and covering up police misconduct. Anthony also alleges
9 NLVPD's chief of police failed to train, supervise, and discipline officers, resulting in the
10 constitutional violations.

11 "Municipalities, their agencies, and their supervisory personnel cannot be held liable
12 under section 1983 on a theory of respondeat superior." *Shaw v. State of Cal. Dep't of Alcoholic*
13 *Beverage Control*, 788 F.2d 600, 610 (9th Cir. 1986). But these entities may be held liable for
14 "deprivations of constitutional rights resulting from their policies or customs." *Id.* Thus, a
15 plaintiff suing a municipality or its agency must establish both a constitutional deprivation and
16 the existence of a municipal custom or policy that caused the deprivation. *Munger v. City of*
17 *Glasgow Police Dep't*, 227 F.3d 1082, 1087 (9th Cir. 2000) (citing *Monell v. Dep't of Soc. Servs.*,
18 436 U.S. 658, 690-91 (1978)).

19 "A municipality's failure to train an employee who has caused a constitutional violation
20 can be the basis for § 1983 liability where the failure to train amounts to deliberate indifference to
21 the rights of persons with whom the employee comes into contact." *Long v. Cnty. of L.A.*, 442
22 F.3d 1178, 1186 (9th Cir. 2006). A plaintiff making such a claim must show the training program
23 is inadequate and the inadequate training represents municipal policy. *Id.* However, evidence the
24 municipality failed to train one officer is insufficient to establish a municipality's deliberate
25 policy. *Blankenhorn v. City of Orange*, 485 F.3d 463, 484-85 (9th Cir. 2007). Rather, the
26 inadequate training must be widespread. *Id.*

1 A plaintiff may prove a municipal policy was the moving force behind a constitutional
2 violation in three ways: (1) the municipality adopted an express policy; (2) a municipal employee
3 commits a constitutional violation pursuant to the municipality's longstanding practice or custom;
4 or (3) the person causing the violation has final policymaking authority. *Webb v. Sloan*, 330 F.3d
5 1158, 1164 (9th Cir. 2003). A pattern of tortious conduct by inadequately trained employees may
6 show inadequate training is the moving force behind a plaintiff's injury. *Long*, 442 F.3d at 1186-
7 87. Alternatively, a plaintiff may establish failure-to-train even without showing a pattern where
8 a "violation of federal rights may be a highly predictable consequence of a failure to equip law
9 enforcement officers with specific tools to handle recurring situations." *Id.* (quotation omitted).

10 Anthony does not cite to any evidence of a policy, custom, or practice that was the
11 moving force behind the alleged constitutional violations. Instead, he argues the NLVPD
12 defendants were trained at the same academy as the Henderson police officers, and the Henderson
13 Police Department enacted policy changes in response to this incident. He argues it is thus
14 "reasonable to assume" that NLVPD's policies caused the constitutional violations in this case.

15 This is insufficient at summary judgment. First, Anthony does not offer evidence that the
16 two police departments train at the same academy. Moreover, Anthony's unsupported
17 assumption cannot raise a genuine issue of fact. The fact that Henderson changed its policies
18 does nothing to show whether NLVPD had the same policies or whether those policies were
19 constitutionally deficient. Moreover, Anthony does not identify what policy is at issue, much less
20 point to evidence raising a genuine dispute that the policy both existed and was the moving force
21 behind the violations. He has identified only this incident as evidence of inadequate training, but
22 a single incident generally does not suffice to show a widespread deficient training program. He
23 presents no evidence on what training the officers received or how that training was deficient.
24 Consequently, he has not presented evidence raising a genuine issue on the *Monell* claim, and I
25 therefore grant the NLVPD's motion for summary judgment on this claim.

26 **IV. STATE LAW CLAIMS**

27 **A. Discretionary Immunity**

28

1 To receive discretionary immunity under Nevada Revised Statutes § 41.032(2), a public
2 employee's decision "must (1) involve an element of individual judgment or choice and (2) be
3 based on considerations of social, economic, or political policy." *Martinez v. Maruszczak*, 168
4 P.3d 720, 729 (2007) (en banc). The Supreme Court of Nevada looks to federal decisional law on
5 the Federal Tort Claims Act for guidance on what type of conduct discretionary immunity
6 protects. *Id.* at 727-28.

7 The United States Court of Appeals for the Ninth Circuit and other circuits have held that
8 "decisions relating to the hiring, training, and supervision of employees usually involve policy
9 judgments of the type Congress intended the discretionary function exception to shield." *Vickers*
10 *v. United States*, 228 F.3d 944, 950 (9th Cir. 2000) (citing cases). Thus, the NLVPD defendants
11 are entitled to discretionary immunity on Anthony's negligent training and supervision claim in
12 count twenty-two. I therefore grant the NLVPD defendants' motion as to that claim.

13 However, "[d]ecisions regarding the amount of force to use are not the kind of policy
14 decisions the discretionary-function exception was designed to shield." *Vasquez-Brenes v. Las*
15 *Vegas Metro. Police Dep't*, 51 F. Supp. 3d 999, 1013 (D. Nev. 2014). Further, acts taken in
16 violation of the Constitution or in bad faith are not discretionary. *Mirmehdi v. United States*, 689
17 F.3d 975, 984 (9th Cir. 2011); *Nurse v. United States*, 226 F.3d 996, 1002 (9th Cir. 2000); *Falline*
18 *v. GNLV Corp.*, 823 P.2d 888, 892 n.3 (Nev. 1991). For example, "where an officer arrests a
19 citizen in an abusive manner not as the result of the exercise of poor judgment as to the force
20 required to make an arrest, but instead because of hostility toward a suspect or a particular class
21 of suspects (such as members of racial minority groups) or because of a willful or deliberate
22 disregard for the rights of a particular citizen or citizens, the officer's actions are the result of bad
23 faith and he is not immune from suit." *Davis v. City of Las Vegas*, 478 F.3d 1048, 1060 (9th Cir.
24 2007).

25 Genuine disputes remain about the constitutionality of the NLVPD's actions. Moreover,
26 viewing the facts in the light most favorable to Anthony, a reasonable jury could find the officers
27 acted in bad faith with a motive to retaliate against Anthony for photographing them and making
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1 a rude gesture at them. According to Anthony, one of the officers specifically mentioned the fact
2 that Anthony made a rude gesture to them. *See Velazquez v. City of Long Beach*, 793 F.3d 1010,
3 1022 (9th Cir. 2015) (stating officers cannot rely on the “offense of ‘contempt of cop,’ in which
4 officers charge resisting arrest or failure to obey or other minimal procedural offenses simply to
5 punish or exact retribution on disrespectful or non-submissive individuals”). The NLVPD
6 defendants therefore have not shown they are entitled to discretionary immunity on the other state
7 law claims.

8 **B. Assault and Battery**

9 Counts thirteen and fourteen allege assault and battery. Count fifteen alleges false arrest
10 and imprisonment.

11 “Under Nevada law, a police officer is privileged to use the amount of force reasonably
12 necessary.” *Vasquez-Brenes*, 51 F. Supp. 3d at 1014. However, “[a]n officer who uses more force
13 than is reasonably necessary is liable for battery.” *Id.*; *see also Ramirez v. City of Reno*, 925 F.
14 Supp. 681, 691 (D. Nev. 1996) (applying Nevada law). Thus, the standard for assault and battery
15 by a police officer under Nevada law is the same as under a § 1983 claim. *Vasquez-Brenes*, 51 F.
16 Supp. 3d at 1014; *Ramirez*, 925 F. Supp. at 691. Because genuine disputes remain about whether
17 the NLVPD defendants used reasonable force, I deny the NLVPD defendants’ motion for
18 summary judgment on these claims.

19 **C. False Arrest and Imprisonment**

20 “To establish false imprisonment of which false arrest is an integral part, it is . . .
21 necessary to prove that the [plaintiff was] restrained of his liberty under the probable imminence
22 of force without any legal cause or justification.” *Garton v. City of Reno*, 720 P.2d 1227, 1228
23 (Nev. 1986) (quotation omitted). Probable cause may provide legal justification for an arrest to
24 defeat claims of false arrest and false imprisonment. *Hernandez v. City of Reno*, 634 P.2d 668,
25 671 (Nev. 1981). However, as discussed above, a genuine dispute remains about whether the
26 officers had probable cause to arrest Anthony. I therefore deny the NLVPD defendants’ summary
27 judgment motion as to this claim.
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1 **D. Intentional Infliction of Emotional Distress**

2 Count sixteen alleges intentional infliction of emotional distress (IIED). Under Nevada
3 law, IIED requires three elements: “(1) extreme and outrageous conduct with either the intention
4 of, or reckless disregard for, causing emotional distress, (2) the plaintiff’s having suffered severe
5 or extreme emotional distress and (3) actual or proximate causation.” *Olivero v. Lowe*, 995 P.2d
6 1023, 1025 (Nev. 2000).

7 The NLVPD defendants move for summary judgment on this claim on the basis that their
8 conduct does not rise to the level of extreme and outrageous conduct. Outrageous conduct is
9 behavior that goes “outside all possible bounds of decency and is regarded as utterly intolerable in
10 a civilized community.” *Maduike v. Agency Rent-A-Car*, 953 P.2d 24, 26 (Nev. 1998) (quotation
11 omitted). The Supreme Court of Nevada has referred to the Restatement (Second) of Torts § 46
12 as relevant authority for IIED claims under Nevada law. *See, e.g., Olivero*, 995 P.2d at 1027;
13 *Selsnick v. Horton*, 620 P.2d 1256, 1257 (Nev. 1980). A police officer’s conduct may rise to the
14 level of extreme and outrageous when he engages in an “extreme abuse” of his position.
15 Restatement (Second) of Torts § 46, cmts. The comments to the Restatement offer examples of
16 when a police officer’s conduct may be so outrageous as to support an IIED claim, such as where
17 the officer attempts to extort money by a threat of arrest or attempts to extort a confession by
18 falsely telling the accused her child has been injured in an accident and she cannot go to the
19 hospital until she confesses. “The Court determines whether the defendant’s conduct may be
20 regarded as extreme and outrageous so as to permit recovery, but, where reasonable people may
21 differ, the jury determines whether the conduct was extreme and outrageous enough to result in
22 liability.” *Cehade Refai v. Lazaro*, 614 F. Supp. 2d 1103, 1121 (D. Nev. 2009).

23 Viewing the facts in the light most favorable to Anthony, reasonable people could differ
24 as to whether the officers’ conduct rises to the level of extreme and outrageous. Taking
25 Anthony’s version of the facts as true, the officers aimed loaded weapons at him when he was
26 unarmed and posed no immediate threat, forcibly entered his home without a warrant and without
27 an emergency or exigency supporting the entry, shot him with pepperballs when he posed no
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1 immediate threat to the officers, forcefully dropped a knee into his back to handcuff him even
2 though he was not resisting, and shoved his face into a stucco wall at a time when he was
3 restrained and not resisting. Additionally, a reasonable jury could find the officers acted with the
4 intent to punish Anthony because he was photographing them and made a rude hand gesture at
5 them. I cannot say as a matter of law that this conduct does not rise to the level of an extreme
6 abuse of police power. I therefore deny the NLVPD defendants' motion for summary judgment
7 on this claim.

8 **E. Civil Conspiracy**

9 Count eighteen alleges civil conspiracy. Under Nevada law, a civil conspiracy "consists
10 of a combination of two or more persons who, by some concerted action, intend to accomplish an
11 unlawful objective for the purpose of harming another, and damage results from the act or acts."
12 *Consol. Generator-Nevada, Inc. v. Cummins Engine Co.*, 971 P.2d 1251, 1256 (Nev. 1998)
13 (quotation omitted). Thus, to establish a civil conspiracy claim, a plaintiff must show: (1) the
14 commission of an underlying tort; (2) an agreement between the defendants to commit that tort;
15 and (3) resulting damages. *Jordan v. State ex rel. Dep't of Motor Vehicles & Pub. Safety*, 110
16 P.3d 30, 51 (Nev. 2005), *overruled on other grounds by Buzz Stew, LLC v. City of N. Las Vegas*,
17 181 P.3d 670, 672 n.6 (Nev. 2008). The agreement may be shown through direct or
18 circumstantial evidence. *Guilfoyle v. Olde Monmouth Stock Transfer Co.*, 335 P.3d 190, 199
19 (Nev. 2014) (en banc).

20 Genuine disputes remain about whether the NLVPD defendants committed underlying
21 torts. Additionally, there is a genuine dispute about whether the officers reached an agreement to
22 commit those torts. Cawthorn stated the officers developed a plan to ask Anthony to leave and to
23 arrest him if he refused to do so. Thus, there is evidence the officers agreed on some plan related
24 to Anthony's treatment. They approached the house together and acted in coordinated fashion.
25 The circumstantial evidence of the warrantless, non-exigent entry into the home; the near
26 immediate use of force; followed by the shoving of Anthony's face into the stucco after he was
27 compliant; and an officer specifically referring to Anthony making a rude gesture at the officers
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1 only to be shushed by his fellow officer could lead a reasonable jury to conclude that the
2 defendants developed a plan to punish Anthony for a perceived lack of the appropriate level of
3 respect and submissiveness to police officers. I therefore deny the NLVPD defendants' motion
4 for summary judgment on this claim.

5 **V. CONCLUSION**

6 IT IS THEREFORE ORDERED that the defendants' motion for summary judgment
7 **(ECF No. 111) is GRANTED in part and DENIED in part.** The NLVPD defendants are
8 entitled to summary judgment on plaintiff Anthony Mitchell's claims for *Monell* liability in count
9 ten and negligent hiring, retention, and supervision in count twenty-two of the First Amended
10 Complaint. The motion is denied in all other respects.

11 IT IS FURTHER ORDERED that the parties shall meet and confer, and on or before July
12 28, 2017, shall file a joint status report on the following: (1) whether the First Amendment
13 retaliation claim in count one remains pending on behalf of Anthony Mitchell against the NLVPD
14 defendants; (2) whether the Eighth Amendment deliberate indifference claim in count eight
15 remains pending on behalf of Anthony Mitchell against the NLVPD defendants; and (3) whether
16 any claim remains pending on behalf of Michael or Linda Mitchell against the NLVPD
17 defendants.

18 DATED this 3rd day of July, 2017.



19 ANDREW P. GORDON
20 UNITED STATES DISTRICT JUDGE
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